



P. O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • Website: [www.deq.state.mt.us](http://www.deq.state.mt.us)

## MINUTES OCTOBER 1, 2004

### Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:04 a.m., on Friday, October 1, 2004, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

### Attendance

Board Members Present: Chairman Joseph Russell, Ward Shanahan, Dr. Garon Smith, Russell Hudson, David Fishbaugh, Susan Brooke, and Kim Lacey (via telephone)

Board Attorney Present: Tom Bowe, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Carol Hendrickson, Lesofski & Walstad Court Reporting

Department Personnel Present: Jan Sensibaugh, Director; Tom Livers, Deputy Director; Lisa Peterson, Director's Office (DIR); Jamesa Dodd, DIR; John North, Legal, DIR; Jane Amdahl, Legal, DIR; Ed Hayes, Legal, DIR; James Madden, Legal, DIR; Keith Christie, Legal, DIR; Keith Jones, Legal, DIR; Gary Hamel, Financial Services, DIR; Steve Welch, Permitting & Compliance Division (PCD); Judy Hanson, PCD; Don Vidrine, Air Resources Management Bureau (ARMB), PCD; Charles Homer, ARMB, PCD; Jan Brown, ARMB, PCD; John Coefield, ARMB, PCD; Sara Williamson, ARMB, PCD; Bill Rule, Waste & Underground Tank Management Bureau (WUTMB), PCD; Rick Thompson, WUTMB, PCD; Bonnie Lovelace, Water Protection Bureau (WPB), PCD; Kari Smith, WPB, PCD; Jon Dilliard, Public Water Supply & Subdivisions Bureau (PWSSB), PCD; Ray Lazuk, PWSSB, PCD; John Camden, PWSSB, PCD; Eugene Pizzini, PWSSB, PCD; Rachel Clark, PWSSB, PCD; Warren McCullough, Environmental Management Bureau (EMB), PCD; Tom Ring, EMB, PCD; Neil Harrington, Industrial & Energy Minerals Bureau, PCD; John Arrigo, Enforcement Division

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Marc Spratt, RLK Hydro; Don Dammot, Culligan Water

- I.A. Review and approve minutes of the July 29, 2004, Upper Blackfoot Mining Complex tour.
- Dr. Smith corrected the spelling of a name listed under the interested persons present. Scott Noblih should be spelled Noblitt.
- Dr. Smith MOVED to approve the July 29 tour minutes with the change noted. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- I.B. Review and approve minutes of July 30, 2004, meeting.
- Mr. Shanahan MOVED to approve the July 30 minutes. Dr. Smith SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- II.A.1.a In the matter of the appeal of a Notice of Violation and Penalty Order by MNLC, Inc., at Cam-Am Convenience Store, BER 2004-03 UST.
- Mr. Bowe informed the Board that the hearing is now scheduled to begin October 26 in Plentywood and that it is possible a proposed decision will be presented to the Board in December.
- II.A.2.a In the matter of the request for hearing by Jim and Glenda Anderson regarding the Christiansen Pit, BER 2004-10 OC.
- Mr. Bowe confirmed that the hearing is scheduled to begin October 18 in Ravalli County.
- II.A.2.b In the matter of M&W Investments, Inc.'s appeal of two subdivision application non-degradation decisions and a deviation request denial, EQ #01-1457 and #00-1822.
- Mr. Bowe had nothing to add to the summary on the agenda.
- II.A.2.c In the matter of the request for hearing by CR Kendall Corporation, BER 2002-09 MM.
- Mr. Bowe had nothing to add to the summary on the agenda.
- II.A.2.d In the matter of Flying J Petroleums, Inc. Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01, BER 2003-14 HW.
- Mr. Bowe informed the Board that, at the request of the parties, he had extended the period of stay until December 13, 2004.

II.A.2.e | In the matter of the appeal filed by IIC, Inc. concerning a Notice of Violation and Administrative Penalty Order, BER 2004-01 ASB.

Mr. Bowe said he understood that there had been a settlement and payment had been made under an Administrative Order on Consent. He said the dismissal would be presented to the Board in December.

II.A.2.f | In the matter of the appeal of a Notice of Violation, Administrative Penalty Order, and Order to Take Corrective Action by Big Sky Truck Stop, BER 2004-07 UST.

Mr. Bowe had nothing to add to the summary on the agenda.

II.A.2.g | In the matter of the request for hearing of Lang Creek Brewery, Inc, BER 2004-13 WQ.

Mr. Bowe had nothing to add to the summary on the agenda.

II.B.1 | In the matter of the Yellowstone County Local Air Pollution Control Program.

Mr. Homer reminded the Board that they had issued a contingent order approving the Yellowstone County Local Air Pollution Control Program on June 4. He said the attorney for the County Health Department submitted a letter on July 27 indicating that all the contingent requirements had been met. Mr. Homer indicated that he had reviewed the material and his opinion is that the parties had complied with the Board's order.

II.B.2 | In the matter of the review of Agency fees.

Mr. Livers referred to a spreadsheet provided to the Board and said he would defer the first item, air quality fees, and cover it in detail during a later agenda item, III.A.2.

The next fee was the water quality discharge permit fee and Mr. Livers noted an increase in expenditures. He said there is an increased workload and a backlog, and that the department is moving resources into this area to try to resolve the backlog and remain current. Mr. Livers said these additional resources would rely on fees as opposed to EPA funds.

Mr. Livers noted an additional one-time expense of the programmatic Environmental Impact Statement for defining animal feeding operations. He said the department was working with the EPA to find special funding.

The next item was the Public Water Supply – Plan and Spec Review fees. Mr. Livers noted the continual decline in fund balance over the next few years and said the department needs to look at a fee adjustment. He explained that the law requires the fees to be commensurate with costs and currently that's not the case. He said the department plans to initiate rulemaking on it in December or January.

Mr. Livers directed the Board's attention to the column on the spreadsheet that showed the fund balance for the solid waste fees. He said the increase of funds over the year reflects the fee increase that the Board approved earlier in the year.

Further discussion took place regarding fund balances.

II.B.3 In the matter of the registration of non-metallic mineral processing plants.

Mr. Homer reminded Board members that they had initiated rulemaking regarding registration of non-metallic mineral processing plants in July. He said a hearing had been held and comments were received both in support and in opposition, and that the department was currently reviewing EPA's comments to determine the appropriate response. Mr. Homer explained that the Board could act on this rulemaking at the December meeting, and still meet the six-month timeframe; therefore, the Department had not prepared this as an action item for this meeting.

Discussion took place regarding the registration process versus the permitting process, and the different levels of public participation between the two processes.

III.A.1 In the matter of the amendment of the rules governing the Montana Strip and Underground Mine Reclamation Act at ARM 17.24.301-1309.

Mr. Harrington said that this process began early in 2003 and that the primary impetus was passage of House Bill 373 by the 2003 Legislature. He said the Department also had wanted to make changes related to federal rules and requirements, required by the Office of Surface Mining, as well as other clarifications and corrections.

Mr. Harrington said after the public hearing was held and comments were received, the Department had some additional discussions with the coal industry and further information regarding necessary changes was communicated. He said that the comments and discussions resulted in the current adoption notice. Mr. Harrington said most of the changes proposed were not substantive. He pointed out three particular changes and provided an explanation for each.

Dr. Smith initiated discussion regarding Comment No. 6, saying he didn't think the response addressed the second part with regard to the term "historically used for cropland." Mr. North provided language to be added to address that portion of the comment.

Chairman Russell asked for public comment. There was no response.

Chairman Russell called for a motion to amend the rules and to adopt the Presiding Officer's report, the Department's 521 and 311 analyses, and the response to comments with the modification to Response No. 6. Mr. Shanahan so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.A.2 | In the matter of the amendment of ARM 17.8.505 and 17.8.514 for the annual adjustment of air quality operation and open burning fees.
- Mr. Homer explained that a hearing was held regarding the annual amendments pertaining to air quality fees and that no comments were received. He said the Department recommended the Board approve the new air quality fees as requested.
- Chairman Russell called for public comment. No one responded.
- Chairman Russell called for a motion to adopt the amendments to ARM 17.8.505 and 17.8.514, the Presiding Officer's report, and the Department's 521 and 311 analyses. Mr. Fishbaugh so MOVED. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.A.3 | In the matter of the amendments of Circular DEQ-4, 2002 edition.
- Mr. Lazuk explained that the purpose of the revision was primarily in response to concerns raised by the water softener industry regarding the prohibition of water softener backwash into septic systems. He said the Department also decided to make several other minor changes to fix some inconsistencies in the circular.
- Mr. Lazuk said 26 comment letters were received and that five members of the public commented at the July hearing. He said that, as a result of public comments, the Department had made three minor changes. Mr. Lazuk concluded that the Department was recommending adoption of those changes.
- Chairman Russell called for public comment. No one responded.
- Chairman Russell called for a motion to amend DEQ 4 and to adopt the Presiding Officer's report, the Department's 521 and 311 analyses, and the Department's responses to comments. Mr. Shanahan so MOVED. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.B.1 | In the matter of the amendment of rules at ARM Title 17, Chapter 38 pertaining to drinking water.
- Mr. Pizzini said the Department was proposing these amendments to update existing rules regarding public water supplies by making the rules consistent with the law and by incorporating by reference the most recent applicable sections of the Code of Federal Regulations. He said the proposed amendments were necessary to allow the Department to enforce public water supply laws and to retain primacy over environmental and public health programs.
- Mr. Pizzini said the Department did not expect the proposed additions to be controversial. He said the Department was requesting initiation of rulemaking and appointment of a presiding officer.

Discussion took place regarding who would be held responsible for violation of the rules, and how much of the burden of the new rules would fall to the State versus local government agencies.

Mr. Livers explained that the Department had initially made a commitment to EPA to have this in place by the end of the calendar year, but that if it could not be done, the Department would request an extension from the EPA. He said that if it proves not to be controversial and the Board approves, the Department would like to bring it back at the December meeting for adoption. Mr. Livers assured the Board that public comment would not be compromised.

Chairman Russell called for public comment. There was no response.

Chairman Russell called for a motion to initiate the rulemaking and to appoint Mr. Bowe as the presiding officer. Mr. Shanahan so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.2 In the matter of the amendment of ARM 17.8.335 to add language to address EPA's concerns that the enforcement prohibition does not apply to enforcement of the MACT standards.

Mr. Homer explained that the current language in the rule prohibits the Department from taking enforcement action for violations of various rules during maintenance of air pollution control by aluminum plants. He said the new language would specify that the prohibition against enforcement does not apply to federal MACT standards.

Mr. Homer explained that the Board had adopted ARM 17.8.335 in 2002 and that the proposed SIP revision was submitted to the EPA in 2003. He said that in October 2003 the EPA proposed to disapprove the revision because of concerns with the rule itself, as well as concerns about the impact of the rule on the MACT rules and NESHAPs (National Emission Standards for Hazardous Air Pollutants). Mr. Homer said the currently proposed rulemaking adds language stating that the prohibition does not apply to MACT standards.

Mr. Homer said the Department recommended that the Board initiate rulemaking, appoint a presiding officer and conduct a hearing.

Discussion took place regarding other states and what they were doing regarding this issue, and how the different regions of EPA might be managed differently.

Chairman Russell called for public comment. There was no response.

Chairman Russell called for a motion to initiate rulemaking and to appoint Mr. Bowe presiding officer. Mr. Shanahan so MOVED. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.3 | In the matter of the amendment of administrative rules pertaining to linear facilities covered by the Major Facility Siting Act (MFSa).

Mr. Ring explained that these rules had not been updated since the mid-1980s and that there had been a lot of legislation since then. He said there was quite a bit of housekeeping to be done to these rules.

Mr. Ring provided history of the Major Facility Siting Act. He said purposes of it were to ensure protection of the State's environmental resources, to ensure consideration of socioeconomic impacts, to provide citizens with an opportunity to participate in siting decisions and to establish a coordinated and efficient method for processing all the authorizations required for regulated facilities.

Mr. Ring explained the issues considered when the Department makes determinations on these applications. He also provided information about the appeal process. Mr. Ring indicated some corrections to the proposed circular. He indicated that the Department was proposing that the Board adopt the new circular. He provided details of the changes being made to the circular.

Mr. Ring said that in addition to the circular the Department was proposing that the Board update rules pertaining to geothermal development and exploration. Discussion took place regarding which agency was responsible for the permitting of geothermal exploration and about the Bonneville Power Administration and Best Management Practices.

Mr. North requested that the Board grant the Department authority to make one change in the rationales indicated in the notice, to ensure the public is aware that changes to the rules also are being proposed.

Chairman Russell called for public comment. No one responded.

Chairman Russell called for a motion to initiate the rulemaking, with the three minor changes, allowing Mr. North to modify the notice enough to clarify the issues, and to appoint Mr. Bowe the presiding officer. Mr. Hudson so MOVED. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.C.1 | In the matter of violations of the Montana Underground Storage Tank Act by Kernaghan's Service, Inc. at Meadow Lark Country Club, Great Falls, BER 2004-11 UST.

Mr. Shanahan MOVED that the Chairman be authorized to sign the order dismissing the appeal. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.C.2 | In the matter of violations of the Water Quality Act by Golden Jubilee Mining, Inc., Philipsburg, BER 2004-02 WQ.

Mr. Shanahan MOVED that the Chairman be authorized to sign the order dismissing the appeal with prejudice. Mr. Hudson SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.D.1 | In the matter of the request for hearing of Old Mill Peninsula Homeowners Association regarding Ward Crushing Tricon Pit #3, St. Regis, BER 2004-14 OC.

Mr. Bowe said as Standing Interim Hearing Examiner he had issued the first prehearing order, received responses on the proposed schedule, and issued a scheduling order. He said the hearing would probably be held in early February 2005.

Chairman Russell called for a motion to appoint Mr. Bowe the permanent hearing examiner for this case. Mr. Shanahan so MOVED. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

IV. | General Public Comment

Chairman Russell called for general public comment. There was no response.

V. | Adjournment

Chairman Russell called for a motion to adjourn. Ms. Brooke so MOVED. Dr. Smith SECONDED the motion. The motion CARRIED with a unanimous VOTE.

The meeting adjourned at 11:15 a.m.

Board of Environmental Review October 1, 2004, minutes approved:

---

JOSEPH W. RUSSELL, M.P.H.  
CHAIRMAN  
BOARD OF ENVIRONMENTAL REVIEW

---

DATE